Message

From: Dykes, Teresa [Dykes.Teresa@epa.gov]
Sent: 5/1/2018 10:57:22 PM
To: Krallman, John [krallman.john@epa.gov]; Jordan, Scott [Jordan.Scott@epa.gov]
CC: Chapman, Apple [Chapman.Apple@epa.gov]
Subject: OAIA Memo
Attachments: WildEarth Guardians v. Lamar Utils. Bd._ 932 F. Supp. 2d 1237.pdf

Scott and John- I found the attached decision that involves a utility that the court considered a major MACT source during construction and up and until it received a permit to limit its PTE to below the 10/25 tpy threshold. There seems to be a series of cases involving the OIAI policy due to the EGU 112(g) MACT issue (case-by-case MACT), the delisting and promulgation of CAMR, and then the court vacating the delisting- thereby imposing 112(g) MACT again on utilities.

This is clearly a case of Major MACT to Area MACT. But even here, the court says that at construction and during construction the source has the legal potential to emit. If the statute was clear, then wouldn't the court have found that a source's "actual" emissions- which were zero at the time be'c in this case I do not think the source had operated yet- controlled and found no violation???

The Wehrum memo stated that it thought the statute was clear on the new interpretation- but even so, I don't see how the memo (which isn't even given deference, but can be considered) can be applied retro-actively to act a defense, as alleged in this case, that the source was not legally a major source for the period of time before its PTE was lowered below the thresholds.

As you can imagine- this is a pretty important question for enforcement- i.e., does the memo apply retroactively- and I don't see how it can (it doesn't have effect of law, and some of the law, at least in this case is counter to its determination). I realize that retro-active application is a different question than whether we would use enforcement discretion and not pursue these cases.

Have either of you something else that you have found that supports retro-activity? Thanks.

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